

***United States Court of Appeals
for the Second Circuit***

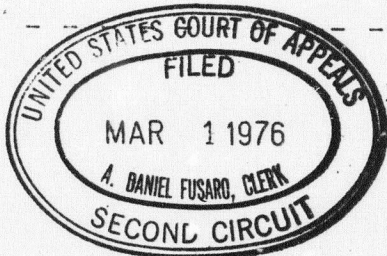


**APPELLANT'S
BRIEF**

75-7692

To be Submitted by
John F. Lang

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT



MILTON RAFFER,

Plaintiff-Appellee,

-against-

ROY M. COHN, THOMAS A. BOLAN, SCOTT E.
MANLEY, DANIEL J. DRISCOLL, MELVIN RUBIN,
MICHAEL ROSEN and HAROLD L. SCHWARTZ,
members of the law firm of SAXE, BACON
and BOLAN,

Defendants,

SAXE, BACON & BOLAN, ROY M. COHN, MICHAEL
ROSEN, DANIEL J. DRISCOLL and SCOTT E.
MANLEY,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' BRIEF

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John F. Lang

Of Counsel

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P/S

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ISSUES PRESENTED

- I Appellee's Former Attorney Was Never Relieved by the Court of Appeals and Hence Bears the Responsibility For Any Alleged Malpractice
- II Appellee Alleges He Retained Only Roy M. Cohn to Prosecute His Appeal, Hence The Complaint Should Have Been Dismissed As to the Other Defendants
- III The Fee To Be Charged Was \$5,000 and Costs.
- IV Judgment Was Improperly Entered Against the Defendants Michael Rosen, and Daniel Driscoll

STATEMENT OF FACTS

Plaintiff- respondent, Milton M. Raffer alleged that he retained the law firm of SAXE, BACON & BOLAN, P.C. to prosecute an appeal of Mr. Raffer's criminal conviction in the Federal Court.

The plaintiff-respondent never retained the law firm but purportedly retained Roy M. Cohn, individually to represent him. The plaintiff- appellee's former attorney Fredrick Block, was never relieved by the Court of Appeals, as the rules require and was still attorney of record and therefore still responsible for the handling of Mr. Raffer's appeal.

A motion to enlarge was made on behalf of Mr. Raffer and same was granted and notice sent to Fredrick Block, not Roy M. Cohn or SAXE, BACON & BOLAN, P.C. Subsequently, the appeal was not perfected because Fredrick Block did not advise Roy M. Cohn of the enlarged time. Motions to reinstate the appeal were denied.

Plaintiff-appellant eventually retained other counsel who succeeded in getting the appeal reinstated, however, upon the merits, the case was affirmed.

POINT I

Appellee's Former Attorney Was Never
relieved by the Court of Appeals and
Hence Bears the Responsibility for
Any Alleged Malpractice

The respondent, Milton Raffer had been represented by Fredrick Block, Esq., during the trial of a criminal matter. After convicted, the respondent desired to take an appeal and sought out Roy M. Cohn for that purpose.

Part II of the Rules of the United States Court of Appeals for the Second Circuit supplementing the Federal Rules of Appellate Procedure (as of January 13, 1972), and 4(b) provides as follows:

4(b) Duties of Trial Counsel in Criminal cases with regard to Appeal by Defendant from a Judgment of Conviction; Motions for leave to withdraw as Counsel on Appeal in Criminal Cases, Duties of Appellate Counsel in the Event of Affirmance.

(a) When a defendant convicted following trial wishes to appeal, trial counsel, whether retained or appointed by the district court, is responsible for representing him until relieved by the Court of Appeals.

In the appeal presented to the Court herein, the record is clear that Mr. Block was not relieved by the Court of Appeals. By not being relieved, Mr. Block assumed the over all responsibility for the appeal. See: Smotherman v. Beto, 276 F.Supp. 579 (D.C.T. ex. 1962); Lovvorn v. Johnson, 118 F.2d 704 (9th Civ., 1941), cert den. 314U.S.607.

POINT II

Appellee. Alleges He Retained Only Roy M. Cohn To Prosecute His Appeal, Hence The Complaint Should Have Been Dismissed As To The Other Defendants.

The Court was in error in its recollection of the testimony. Judge Gagliardi contended that the Defendant-Respondent testified that he retained both Roy M. Cohn and the firm of SAXE, BACON & BOLAN, P.C. (p.14a)*.

However, on cross-examination, Defendant-respondent corrected his direct testimony after some proceeding and having his memory refreshed by his deposition testimony (p. 12a)

"Q Could you tell us, Mr. Raffer, who it was that you retained at this firm? Was it the firm or was it Mr. Cohn or who was it?

"A To the best of my knowledge, it was Roy Cohn.

"Q So you did not retain the firm of Saxe, Bacon & Bolan, did you?"

* * *

"A No, to the best of my knowledge, all I remember retaining was Roy Cohn."

(p. 13a)

"Q Mr. Raffer, isn't it a fact that you never made any arrangements with anyone else at the firm of Saxe, Bacon & Bolan other than Roy M. Cohn as to doing the work for the appeal? Isn't that correct?

"A Yes, sir."

It is abundantly clear that by the Defendant-respondents order testimony he only hired Roy M. Cohn and not the firm of SAXE, BACON & BOLAN, P.C., nor any of the other defendants.

* References are to page numbers of the Appellants' Appendix.

POINT III

The Fee To Be Charged Was \$5,000 and Costs

Michael Rosen testifying on behalf of himself as a defendant and the other defendants related what he knew was the "fee arrangement." (p.15a)

* * *

"Mr. Raffer also, I believe, at the initial conversation had indicated to me that he was thankful or grateful that Mr. Cohn was going to undertake to get the brief out; that part of the price, though, was that he had to make good some \$5,000 worth of checks that his son Bennett had bounced on the firm."

* * *

In other words, before Mr. Cohn would undertake the appeal, Mr. Raffer had to make good his son's checks and that the legal fee for the appeal would be \$5,000. Nowhere is this testimony controverted. As a matter of fact, the defendant-respondent never asked for any money back from Mr. Cohn (p.13a), leading one to the conclusion that at least a good part of the money paid was to cover the son's bad checks.

POINT IV

Judgment was Improperly Entered Against
the Defendants Michael Rosen, and Daniel
J. Driscoll

The Court dismissed the complaint against the defendant Michael Rosen (p.16a) and did not in any manner change its decision. The Court, after a luncheon recess, in directing entry of Judgment stated:

* * *

"The remaining defendants, as I believe they stand before the Court, are Roy M. Cohn, Scott E. Manley, Daniel J. Driscoll, Michael Rosen and the firm of SAXE, BACON & BOLAN" (p.17a)

* * *

The Court apparently overlooked its dismissal in the morning session of the complaint against the defendant Rosen, therefore entry of judgment was improper.

As to the defendant Daniel J. Driscoll, no proof was even presented that he had been served. To the contrary, the docket sheet shows process returned unexecuted 3/27/74.

CONCLUSION

Judgment should be reversed for the Reasons set forth
in the Proceeding Points.

Respectfully submitted

Rippa, Lang, Nesci & O'Toole
Attorneys for Appellant
271 North Avenue
New Rochelle, New York 10801

by 

John Lang, a member of the firm

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT COURT

MILTON RAFFER,

Plaintiff-Appellee,

-against-

ROY M. COHN, THOMAS A. BOLAN, SCOTT E.
MANLEY, DANIEL J. DRISCOLL, MELVIN RUBIN,
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and BOLAN,

Defendants,

SAXE, BACON & BOLAN, ROY M. COHN, MICHAEL
ROSEN, DANIEL J. DRISCOLL and SCOTT E.
MANLEY,

Defendants-Appellants..

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:

SUSAN BELL, being duly sworn, deposes and says;

I am over the age of 18, am not a party to this action
and reside at New York, New York.

On the 1st day of March, 1976, I served the Appellants'
Brief and Appendix (3copies of each) upon FRANZBLAU, FALKIN
& DiMARZIO. Attorneys for the Plaintiff-Appellee, at 1180
Raymond Boulevard, Newark, New Jersey 07102, by depositing them
within a postpaid envelope into an official depository
of the United States Postal Service located within the State of
New York.

Susan Bell
SUSAN BELL

Sworn to before me,
this 1st day of March, 1976

Ronald F. Poepplein
RONALD F. POEPPLEIN
NOTARY PUBLIC, STATE OF NEW YORK
No. 30-4608069
Qualified in Nassau County
Commission Expires March 30, 1977

NOTICE OF ENTRY

Sir:-Please take notice that the within is a (certified)
true copy of a
duly entered in the office of the clerk of the with-
named court on 19

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

NOTICE OF SETTLEMENT

Sir:-Please take notice that an order

of which the within is a true copy will be presented
for settlement to the Hon.

one of the judges of the within named Court, at

on the day of 19

at M.

Dated,

Yours, etc.,

Attorney for

Office and Post Office Address

To

Attorney(s) for

Index No 75-7692

Year 19

UNITED STATES COURT OF APPEALS
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MILTON RAFFER,

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ON APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

RIPPA, LANG, NESCI & O'TOOLE

Attorney for Defendants-Appellants

Office and Post Office Address, Telephone

271 North Avenue
New Rochelle, New York 10801
(914) 636-0300

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for